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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 414

LAM TAT SIN, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Vol. II, 31–36; Pet. App. 10–14) is not yet reported. The opinion of the district court (Vol. I, 2–11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1964 (Vol. I, 37). The petition for a writ of certiorari was filed on August 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, an admittedly deportable Chinese citizen who was found by the court below to have exhibited bad faith in his dealings with the Immigration Service, could lawfully be deported to Hong Kong despite an informal administrative policy of staying the deportation of aliens to that city in deference to its overcrowded refugee conditions.

STATEMENT

Petitioner is a 36-year-old alien, a native and citizen of the Republic of China (on Formosa), who last entered the United States as a crewman on board a merchant vessel at Honolulu, Hawaii, on January 20, 1962 (Vol. II, 1-2; 15; G. Ex. "A", p. 6). He was granted a temporary landing permit not to exceed 29 days. Petitioner remained in the United States longer than the time allowed, and, on May 7, 1962, he was served with an order to show cause why he should not be deported and a notice of hearing (G. Ex. "A", p. 6).

On May 9, 1962, the petitioner, his attorney and government counsel appeared before a special inquiry officer for a hearing in Newark, New Jersey (G. Ex. "A", p. 22). Petitioner admitted deportability (Vol. II, 1-2; G. Ex. "A", p. 6). Petitioner testified that at the time of his birth he was a citizen of the Republic of China, the government of which is now located on the Island of Formosa (Vol. II, 15). From 1947 to 1949, petitioner served in the navy of the Republic of China and was stationed on Taiwan (Formosa) (Vol. II, 6). After his discharge from the navy, petitioner returned to his native village on the mainland of China where he worked as a farmer (Vol. II, 7). In

1951, petitioner traveled to Hong Kong where he obtained employment as a seaman, and from that time to about the time he entered the United States, petitioner was employed by shipping companies as a seaman, shipping in and out of Hong Kong and surrounding areas (Vol. II, 3–5). The Hong Kong Government had issued petitioner a "Seaman's Identity Book" during this period (Vol. II, 5; see G. Ex. "A", pp. 1–4). Petitioner testified that he spent three months in 1957 visiting members of his family on the mainland of China, and that the Hong Kong Government had issued him the necessary document for this purpose (Vol. II, 4, 9–10).

When the special inquiry officer informed the petitioner that in the event that a deportation order was entered against him he had the right to choose a country to which he might be deported, petitioner replied, "I don't think I can find any job in Hong Kong and since my family is on the Mainland of China, I want to go back to the mainland of China, to see my mother and sons" (Vol. II, 2). At the conclusion of the hearing, the special inquiry officer found that the petitioner was deportable as an overstayed crewman under section 241(a)(2) of the 1952 Act and ordered his deportation, in the first instance, to the mainland of China (Vol. II, 17–19). The order further provided that in the event that the "afore-mentioned country" advises that it is unwilling to accept the petitioner into its territory or fails to advise the Attorney General of its intentions in the matter within three months

[1] Petitioner has a wife and children living in Ting Tao on the mainland of China (Vol. II, 11).

of the initial inquiry, petitioner was to be deported to the Republic of China on Formosa, and, if that country was unwilling to accept him, then to Hong Kong (Vol. II, 19). Petitioner did not apply for discretionary relief and waived his right of appeal (Vol. II, 2, 15, 16). A warrant for petitioner's deportation was issued on May 11, 1962 (G. Ex. "A", p. 27).

During May 1962, the Immigration and Naturalization Service adopted an informal general policy of staying the deportation of aliens to certain countries in the Far East, and that policy remains in effect at the present time. The purpose of this policy was to relieve such areas as Hong Kong and Formosa from having to absorb additional people at a time when they are already congested with refugees. Regional offices of the Service have, however, requested and received permission from the Central Office to deport, on a case-by-case basis, individual Chinese aliens to Hong Kong or Formosa.

On February 21, 1963, petitioner appeared before an Immigrant Inspector in New York City for an interview. The following colloquy, under oath, took place (Vol. II, 21–22; G. Ex. "A", pp. 29–30):

> Q. [by the Immigrant Inspector] On May 9, 1962, at your deportation hearing, you designated China as the country to which you wish to be deported. Is that correct?
>
> A. [the petitioner] Yes.
>
> Q. An application for travel document to the Mainland of China will now be made. Do you understand?
>
> A. Yes.
>
> Q. It is expected that this travel document will be issued. Do you understand?

A. Yes.

Q. If a travel document is issued by the Chinese Communist Government, it is the intention of this government to deport you to the Mainland of China. Do you understand?

A. Yes.

* * * * *

Q. Knowing that you have been ordered deported pursuant to the United States Immigration Law, do you still insist on being deported to the Mainland of China?

A. I still want to stay here if I can.

Q. You are advised that this is not a hearing or a further opportunity to make application for relief but only to determine whether or not you desire to be deported to the Mainland of China. Knowing this do you still wish to be deported to the Mainland of China?

A. Yes.

By letter dated May 6, 1963, the representative of the People's Republic of China at the Sino-United States Ambassadorial Talks in Warsaw, Poland, advised the United States Ambassador that his government had agreed to accept the petitioner and two others into its territory at Sumchun, Kwangtung, and asked to be advised of the time of their arrival (Vol. II, 23; G. Ex. "A", pp. 31, 32). Shortly thereafter, the government was notified that the Republic of China on Formosa refused to accept the petitioner into its territory because he did not possess the required entry permit (G. Ex. "A", p. 28).

In October 1963, petitioner was notified that his deportation to the mainland of China was imminent (see Pet. App. 11). Shortly thereafter, petitioner,

through counsel, moved to reopen the administrative proceedings, claiming that he would be subject to physical persecution within the meaning of the section 243(h) of the 1952 Act if returned to the Chinese mainland (Vol. II, 36, 37-38). On November 15, 1963, the special inquiry officer denied the motion but modified his order of May 9, 1962 by striking that portion of the order directing petitioner's deportation to the Chinese mainland (Vol. II, 27–30; G. Ex. "A", pp. 41–44). The order read that petitioner was to be deported to the Republic of China on Formosa in the first instance, and, failing that, to Hong Kong. No appeal was taken.

On December 2, 1963, a second warrant of deportation was issued (G. Ex. "A", p. 46). Thereafter, petitioner was notified that his deportation to Hong Kong had been directed (G. Ex. "A", p. 47).

By complaint filed in the United States District Court for the Southern District of New York, petitioner alleged the existence of an executive policy designed, for political reasons, to stay the present expulsion from the United States of Chinese aliens to Formosa and Hong Kong, and that the government's refusal to stay petitioner's deportation there was contrary to such policy and illegal. On March 3, 1964, the district court granted summary judgment in the government's favor and dismissed the complaint (Vol. I, 2–11). The court concluded that the petitioner had exhibited a lack of good faith in his dealings with the government and that this factor was a sufficient basis for an exception to the government's general policy of staying deportations to Nationalist China and

Hong Kong (Vol. I, 9). On July 13, 1964, the court of appeals affirmed the judgment (Vol. II, 31–36, 37; Pet. App. 10–14).

ARGUMENT

The Immigration Service did not act arbitrarily in refusing to apply to petitioner its informal stay policy which had been inaugurated to relieve Formosa and Hong Kong of the necessity of absorbing deportees at a time when those areas had large refugee populations. As shown by the Statement, *supra*, petitioner, at his deportation hearing of May 9, 1962, designated the mainland of China as the place of deportation in the event that a deportation order was entered against him. He reaffirmed that designation before an Immigrant Inspector on February 21, 1963, after the informal stay policy was in effect, although he was informed by the Immigrant Inspector that an application for a travel document to the mainland of China would be made, that it was "expected that this travel document will be issued", and that if such document was issued the government intended to deport petitioner to the mainland of China (Vol. II, 21). It was not until *after* the Peoples' Republic of China agreed to accept petitioner into its territory and petitioner was notified that his deportation was imminent that he moved to reopen the deportation proceedings on the grounds that his deportation to the Chinese mainland would result in physical persecution within the meaning of section 243(h) of the Immigration and Nationality Act of 1952. Up to that time, petitioner had

never expressed any fear of physical persecution if deported to the mainland of China. Indeed, the present regime had allowed the petitioner to come and go freely in 1950–1951 and 1957–1958 (Vol. II, 3–4, 6–7).

Under section 243 of the Immigration and Nationality Act of 1952, the Attorney General is obligated to inquire of the country to which the alien is to be deported as to its willingness to accept him into its territory. See *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926, 928 (C.A. 2); *Lu* v. *Rogers*, 164 F. Supp. 320, 321–322 (D.D.C.), affirmed, 262 F. 2d 471 (C.A.D.C.). This duty to inquire has been held to extend even to the People's Republic of China with which the United States does not have diplomatic relations. See *Hom Sin* v. *Esperdy*, 209 F. Supp. 3, 5–6 (S.D.N.Y.); *United States ex rel. Wong Kan Wong* v. *Esperdy*, 197 F. Supp. 914, 917 (S.D.N.Y.). Since it is a matter of common knowledge that the United States has not recognized the People's Republic of China, petitioner apparently assumed that designation of the mainland would bar his deportation for a longer period than the informal stay policy might be effective. That his deliberate calculation proved wrong does not render the government's action illegal. There was ample justification for the government to conclude that the petitioner was not acting in good faith when he designated the mainland of China and persisted in that designation until that country had accepted him. Accordingly, there was nothing arbitrary or capricious about the government's refusal to stay petitioner's

deportation to Hong Kong. As the court below put it (Pet. App. 14), "Adoption of a policy of forbearance does not require the Attorney General to stay all deportation orders so long as the exceptions he draws are reasonable and are generally applicable."

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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